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No. 94-1809

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MATSUSHITA ELECTRICAL INDUSTRIAL CO., LTD.
AND MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

LAWRENCE EPSTEIN, et al.,

Respondents.

MATSUSHITA ELECTRICAL INDUSTRIAL CO., LTD.
AND MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

WALTER MINTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPSTEIN BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Section 14(d)(7) of the 1934 Exchange Act (added by the "Williams Act") and SEC rule 14d-10 promulgated thereunder, the so-called "all-holders, best-price rule", require (unlike Delaware law) shareholder equality "during [a] tender offer." The Ninth Circuit held, *inter alia*, that a special stock arrangement between Matsushita and Lew Wasserman, MCA's chairman and owner of 5 million shares of its common stock, violated that rule. In a series of interlocutory orders, did the court below err in

(i) concluding that the complex and unique Wasserman transaction occurred "during" a tender offer;

(ii) in agreeing with the Second and Third Circuits that section 14(d)(7) created an implied right of action, a point that petitioners had in fact expressly conceded in the court of appeals;

(iii) following limits on settlement authority announced in both the Second and Third Circuits, and then refusing to give preclusive effect to a completely non-adversarial Delaware "settlement" release of causes of action when (a) the sole purpose of the

"settlement" was to extinguish 14d-10 claims in a pending federal appeal, claims over which the federal courts have excusive jurisdiction; and (b) the 14d-10 chim does not overlap (either as to matters of fact or of law) with any of the state law causes of action;

(iv) in refusing to give preclusive effect to a completely non-adversarial Delaware "settlement", the sole purpose of which was to extinguish the 14d-10 claims, in the context of settling state law causes of action that over a year and one half earlier the state court had characterized to be "at best, extremely weak" and in which Delaware petitioners' counsel had characterized the 14d-10 claims as frivolous, and in the context of a settlement that the court acknowledged to give "meager" benefits to the class and in which "suspicion of collusion" abounds?

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INTRODUCTION

This petition arises out of Matsushita Electrical Co. Ltd. and its subsidiaries' ("Matsushita") $6.1 billion dollar acquisition of the common stock of MCA, Inc. ("MCA"). The class complaint charged that Matsushita's public tender offer violated federal securities laws because of (a) a special stock swap arrangement that was provided to Lew Wasserman, MCA's chairman and chief executive officer, and (b), a $21,000,000 bonus paid to Sidney Sheinberg, its chief operating officer and owner of 1,170,000 shares (ER 100:3).[1] These arrangements were alleged to have violated two SEC rules that enforce section 14(d)(7) of the Exchange Act: rule 14d-10, the so-called "all-holders, best-price" requirement, because "during [a] tender offer" Matsushita provided higher consideration to Wasserman and Sheinberg, and "in a tender offer" also offered consideration not open to all stockholders; and rule 10b-13, because they resulted in Matsushita's illegal purchase of shares during the tender offer period (ER 100:2, 17-18). Expressly designed to reject Delaware corporation law, rule 14d-10 prohibits premium payments to favored shareholders "during" a tender offer. Appendix ("App.") 36a n. 31.

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[1] References to "ER" are to the Epstein Plaintiffs' Excerpts of Record, submitted to the U.S. Court of Appeals for the Ninth Circuit. Citations are by docket control number, followed by exhibit number and page number, if appropriate, as follows: "Docket Number: Page Number" or "Docket Number/Exhibit Number: Page Number". Passages within the reporter's transcript are included within the Excerpts of Record and are referred to as "RT" along with the date of the hearing and a citation to the exact number of the page being referenced, as follows: "ER RT Date of Hearing: Page Number."

The district court dismissed both a securities class action ("Epstein") and an individual complaint ("Minton"). In major part, the court of appeals reversed. *Epstein v. MCA, Inc.*, to be reported at 50 F.3d 644 (9th Cir. 1995); App. 1a. On the basis of this Court's intervening decision in *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994), the court did affirm dismissal of the Epstein complaint's "aider and abetter" claims against Wasserman and Sheinberg individually. App. 4a n.7. However, the court held that on the undisputed facts the Matsushita/ Wasserman transaction violated 14d-10, App. 11a-20a, and that a jury could so find with respect to a $21,000,000 "bonus" received by Sheinberg. App. 20a-23a. Since 14d-10 could provide all the relief to which plaintiffs are entitled, the court declined to address the 10b-13 claims. App. 3a n.5. The court also held that a Delaware state court "settlement", the sole purpose of which was to release the 14d-10 claims, did not bar the federal action. App. 24a-40a. The court, accordingly, ordered entry of a summary judgment on the Wasserman stock payment and remanded for determination of damages "if any" on that finding; ordered that a class be certified; instructed the district court to consider further amendments to the complaint; and remanded for further proceedings consistent with its opinion. A petition for rehearing (raising precisely the same issues as the petition here) was denied. A suggestion for rehearing *en banc* was rejected, none of the court's 26 active judges having called for a vote. App. 62a.

This petition provides no issue appropriate for this court's review. There is no final judgment, and this court rarely grants review of interlocutory orders. *E.g.*, *Brotherhood of Loc. Fire & Eng. v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967); Stern, *et al.*, *Supreme Court Practice* §4.18 (7th ed. 1993) ("Stern").[2] No reason exists to depart from settled practice here. Further proceedings may moot or reshape some of the issues raised. More important, petitioners will have the opportunity to raise these issues after a final judgment. Finally, none of the claims presented is independently "cert-worthy."

First. The theory of the complaint, sustained by the court below, was that the interlocking of the Wasserman transaction with the public tender offer plainly made the Wasserman transaction part and parcel of the tender offer. Whether the unique and complex Wasserman transaction was "during" and "in" the "tender offer" is a fact-intensive issue whose contours fit this transaction only. No issue of general importance is presented. What is more, wholly apart from the Wasserman holding, a 14d-10 trial would still be necessary because of the court's remand for trial on the "Sheinberg" transaction -- a matter scarcely mentioned in the petition (p. 22, n. 19). App. 23a.

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[2] Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993).

Second. In holding that an implied right of action existed under section 14(d)(7) to enforce rule 14d-10, the court below hewed closely to this court's precedents. The court agreed with recent decisions in the Second and Third Circuits, decisions not even mentioned by petitioners. Moreover, in the court below petitioners affirmatively represented that such a right existed.

Third. In their effort to create a "cert-worthy" issue out of the court's refusal to permit a Delaware settlement to bar this federal action, petitioners egregiously misstate the holding below. The court did not deny preclusive effect to the Delaware proceeding because of some general "'policy' requiring that exclusively federal claims be resolved by settlement only in a federal court" (Pet. at 2). The court said very nearly the opposite. The court was willing to assume that a Delaware release/ judgment would be effective to bar federal claims that were simply counterparts to the state law claims, even though jurisdiction of 1934 Act claims is exclusively in the federal courts. (For example, rule 10b-5 claims have their counterpart in common law fraud.) Following a distinction drawn by Judge Friendly in the Second Circuit and recently recognized in the Third Circuit, the court held, however, that 28 U.S.C. §1738 did not require that preclusive effect be given to a "settlement" of state law claims that also purported to release federal claims, when,

as here, the federal claims do not overlap (in law or in fact) with any of the compromised state causes of action.[3]

The court below thus did not reach respondents' alternative argument: that the Delaware proceeding was constitutionally defective because of the manifestly inadequate class representation. In the context of "settling" state law claims that one year and a half earlier the state court (in rejecting another settlement) had held to be, "at best, extremely weak and, therefore, [of] little or no value", and in the context of a current "settlement" which the court acknowledged provided "meager" benefits and which was enveloped by a "suspicion of collusion", Delaware class representatives purported to release petitioners' potentially "multi-billion dollar liability" (pet. at 25) federal claims they had earlier branded as "frivolous", claims that they had no incentive to and did not protect. A sell out, not a settlement, occurred in Delaware.

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[3] Delaware law does not prohibit premiums to dominant shareholders when they transfer shares that carry with them control of the corporation. Rule 14d-10 was designed to reject that rule, when federally regulated tender offers are the means by which shares are acquired. Petitioners conceded absence of such an overlap in the court below. "Matsushita makes no attempt to argue that any of the Williams Act claims share any predicate in common with the state law claims that formed the basis of the Delaware class action". App. 35a.

REASONS FOR DENYING THE WRIT

A. WASSERMAN TRANSACTION

Petitioners nowhere deny that rule 14d-10, the "all-holders, best-price rule," requires shareholder equality "during [a] tender offer." The court below held that, on the undisputed facts, the Wasserman stock purchase transaction occurred during such an offer. Petitioners assert that this holding conflicts with the Fourth Circuit's decision in *Kahn*[4], which the court below had carefully considered and harmonized. App. 19a. The alleged "conflict" is non-existent, and the claim is designed to mask what the petition really invites: this court's review of the application of settled legal principles to a fact-intensive, complex, and unique set of events. Rare indeed

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[4] *Kahn v. Virginia Retirement System*, 13 F.3d 110 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1834 (1994). Petitioner's appendix includes documents related to the *Kahn* transaction. These documents were not before any court below. We will, however, not now clutter the record with a motion to strike. Suffice it to say that those documents are not properly part of the record here. *Stern*, *supra*, §12.4.

Even as amplified by these materials entirely outside the record, however, there is no conflict: the "private" purchase in *Kahn* did not tie the price to changes in the tender offer price or give the "private seller" the right to prohibit payment to others until the private purchaser was paid. Finally, even if the court below misunderstood the facts of the *Kahn* transaction (rather than the legal rule) that would raise no issue of general importance. *Certiorari* surely is not appropriate to review not the legal rule but two facts-specific takeover arrangements.

are the occasions in which *certiorari* has issued for such purposes. *Stern*, *supra*, at §4.14. Since no issue of general public importance -- none whatever -- is raised, *certiorari* is inappropriate. *Layne & Bowler Corp. v. Western Wells Works*, 261 U.S. 387, 393 (1923); *Stern*, §4.11.

Petitioners' attempt to inflate the court's ruling on what petitioners themselves acknowledge to be a unique transaction into a fundamental threat to the integrity of the tender offer mechanism is preposterous. Contrary to the claim that the court's decision created uncertainty, it removed it. The opinion makes clear what is included "during [a] tender offer" and what is not. App. 18a-19a. In so doing, the court did no more than apply the doctrine set out in Judge Winter's careful opinion in *Field v. Trump*, 850 F.2d 938, 944 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989) (App. 17a-18a), a decision not even mentioned in the petition. Petitioners cite not a single tender offer that would have been or will be threatened by this judgment.

The court's decision was plainly correct on the merits. The structure of the Matsushita-MCA transaction was a transparent violation of rule 14d-10(c). The rule requires that where a tender offerer employs more than one kind of consideration, for example, cash and securities, each shareholder must be allowed the same right to choose among the options offered. That right, in turn, protects the right to receive equal value for one's shares,

and it avoids complex valuation arguments as to whether a particular amount of cash is worth more or less than some new security. Thus, Matsushita could not legally offer Wasserman preferred shares[5] and other shareholders cash. To avoid the rule's prohibition, Matsushita executed an agreement with Wasserman a few minutes before the signing of the public tender offer documents, agreeing to provide the preferred stock in exchange for MCA shares, the side deal to close a few moments after the public had surrendered its shares of MCA, and only if the tender offer attracted sufficient shares. The deal was wholly conditional on the tender offer and its documents: Any delay in the tender offer automatically extended the time for closing the Wasserman deal. Any breach of condition cancelling the tender offer, cancelled the Wasserman offer. If there were any increases in price -- if the hoped-for (by Wasserman) bidding war broke out for MCA (as had happened with Time Warner), and Matsushita raised its price, Wasserman got the benefit. Indeed, Matsushita promised Wasserman it would not pay cash for the shares it had "accepted for payment" from the shareholders, unless and until the Wasserman deal was carried out. And

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[5] To provide equal treatment to other key insiders, Matsushita offered Sheinberg and Geffen the opportunity to receive preferred stock. To provide equal treatment to trusts to which he felt committed, Wasserman offered them the right to get some of his preferred stock if they wanted it. But the ordinary shareholder was not offered this stock. ER 357/Ex. D: 29-30, 39. The reason: it costs Matsushita much more than the $66 a share equivalent to issue and maintain this stock. Supplemental Excerpts of Record of Wasserman and Sheinberg (SER) at 22-23, submitted to the Ninth Circuit.

it gave Wasserman the power to enforce that promise by an injunction. Petitioners concede that the Wasserman transaction was fully conditioned upon the tender offer (Pet. at 22-23). And, of course, all the major "players" understood that Wasserman was part and parcel of the tender offer.[6]

If the Wasserman transaction does not violate rule 14d-10, nothing ever will. Simply by virtue of a lawyer's declaration that the transaction is not part of the offer, transactions will escape the equality requirement of rule 14d-10. Why on earth would the SEC promulgate such a vacuous rule? Petitioners say nothing -- nothing at all -- on that point. The court below, quoting the SEC, rightly recognized that 14d-10 embodied a substantive policy and

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[6] Discovery confirmed what was apparent on the face of the documents: all the "players" (the principals, their investment advisors, and the lawyers) understood that the Wasserman transaction was part of the tender offer. For example, MCA board member and investment banker Felix Rohatyn testified:

> "Q. Did you consider MEI's (Matsushita's) acquisition of Mr. Wasserman's stock to be part of MEI's acquisition of MCA?
>
> "A. Yes, I did."

(ER 357/Ex. A: 33-34). MCA's counsel Martin Lipton also represented Wasserman and Sheinberg. He gave precisely the same account (ER 357/Ex. X: 4-5, 104-05). Lipton advised the MCA board that it could consider, *inter alia*, "the fact that the two largest shareholders of the Company have stated their willingness to tender to MEI" (ER 357/Ex. D: 60) (emphasis added).

was not intended to amount to no more than a drafting exercise for first year associates. App. 15a-16a.

Petitioners assert (Pet. at 4, 22) that the court below overlooked a stipulation that "the Wasserman transaction was entered into when no tender offer was pending" (Pet. at 4). No such stipulation appears in the pages (App. 49a-50a) to which reference is made. That reference is to part of the "findings" made by the district court, part of a set submitted by the petitioners' counsel which the court simply signed with only two trivial changes. (App. 45a). The terms of the stipulation finally appear in a footnote. (Pet. at 22 n. 20.) And what appears?: a stipulation as to what points on a clock certain events occurred, a time sequence which the court of appeals fully understood. This hardly constitutes a stipulation that "the Wasserman transaction was entered into when no tender offer was pending". Moreover, even if the court had misunderstood the stipulation that would provide no basis for *certiorari*. *Certiorari* is not used to supervise appellate court understanding of fact-specific stipulations.

Finally, we observe that, unless the slim footnote reference in the petition at p. 22, n. 19 suffices, the petition makes no challenge to the remand for factual trial on Sheinberg. The court held that a jury might find that a $21,000,000 bonus paid to MCA's CEO was made to secure his adherence to the transaction and to tender his shares. App. 20a-23a. Thus, the 14d-10 issue would remain in the case no matter what this Court held.

B. IMPLIED RIGHT OF ACTION

Petitioners' implied right of action analysis rests upon three mischaracterizations: their own position; the court of appeal's analysis; and finally, this Court's precedents.

Wasserman and Sheinberg argued on appeal that no private right of action existed under section 14(d)(7), and thus that rule 14d-10 could not be enforced by private action.[7] By contrast, petitioners expressly conceded the existence of an implied right of action. In petitioners' merits brief (p. 47) they said

> "The Epstein Plaintiffs' concession that there is no need to attempt to demonstrate the existence of a private right of action under Rule 10b-13, because Rule 14d-10 already provides plaintiffs with full protection, *see* Epstein Br. at 53, undercuts any argument that a private right of action *must* be created under Rule 10b-13 to safeguard the interests of tendering shareholders. In addition to SEC enforcement actions and Rule 14d-10 claims, stockholders are further protected by Rule 10b-5, ..."

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[7] As indicated, p. 2, *supra*, the judgment in their favor was affirmed on another ground.

Petitioners have spent a good deal of energy attempting to extricate themselves from the representation that rule 14d-10 claims provide shareholders adequate remedies for breaches of the equal treatment requirement. The Ninth Circuit gave petitioners the "benefit of the doubt", and permitted them to make the argument, pointing, however, only to a document submitted long after the oral arguments on the merits. App. 5a n. 9. This Court is under no similar obligation to accommodate petitioners' effort.[8]

Even if petitioners had standing to challenge the existence of an implied right of action, their challenge is meritless. The court below fully understood that whether an implied right of action exists is a question of legislative intent. App. 7a.[9] Indeed, the court pointed out that two recent Ninth Circuit cases had been overruled for failure to recognize that.[10] *Ibid.* The court engaged in a careful analysis of the language and structure of the section 14(d)(7), which is uniquely clear in its intent: an offeror "shall pay". App. 7a-11a. We need not restate the analysis. The court's conclusion was in complete accord

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[8] The existence of an implied right of action, *vel non*, is not jurisdictional. *Northwest Airlines, Inc. v. County of Kent*, 114 S.Ct. 855, 862 (1994).

[9] The court said that the relevant inquiry was "whether there is an implicit indication, in the statute's language, legislative history, or structure, of legislative intent to create a private remedy, and whether such an implication would be consistent with the underlying legislative scheme." App. 7a.

[10] *Ibid.*

with earlier decisions by the Second Circuit (authored by Judge Winter) and the Third Circuit (authored by Judge Becker). *Field v. Trump*, 850 F.2d 938, 946 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *Polaroid Corp. v. Disney*, 862 F.2d 987, 996 (3d Cir. 1988). See also *Pryor v. United States Steel Corp.*, 794 F.2d 52, 57-58 (2d Cir.), *cert. denied*, 479 U.S. 954 (1986) (§14(d)(6) contains private right of action). "Matsushita argues that we should not follow Pryor, Field, and Polaroid", the court observed. App. 7a. Interestingly, in their petition to this court, petitioners make no reference whatsoever to those decisions.[11] Nor do they note that two other federal circuits have recognized, by implication, that rule 14d-10 is enforceable in a private action. See *Kahn v. Virginia*,

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[11] In their motions for rehearing and for a stay on the mandate, petitioners vigorously asserted that the court erred in considering the "context" in which the Williams Act was enacted in determining legislative intent. Petitioners have now demoted the argument to a footnote. Pet. at 18-19 n. 15. Rightly so, because the contention is obviously meritless. First, context was only one factor which the court considered in determining legislative intent, and it was the last. Only after the court considered the language and structure of section 14(d)(7), 50 F.3d 644 (9th Cir. 1995), did the court say "Finally, the legal context . . ." App. 9a. Even if context could never be considered, the previous factors relied upon by the court would justify a private right of action. Moreover, the context in which a statute is enacted is a relevant factor in determining legislative intent. See the discussion at App. 7a and the decisions cited at note 14 of the court's opinion. App. 10a-11a. Even Justice Scalia, no fan of implied rights of action, is not on record as opposed to that position. Writing for himself alone in *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) he urged the courts to "get out of the business of implied rights of action altogether" with respect to newly enacted legislation.

supra, and *Priddy v. Edelman*, 679 F. Supp. 1425 (E.D. Mich. 1988), *aff'd on other grounds*, 883 F.2d 438 (6th Cir. 1989).

Petitioners also observe that 14d-10 comes 18 years after section 14(d)(7), and apparently for that reason this rule should not be federally enforced. Pet. at 3, 19. This argument was never advanced by any litigant in the court below. Wasserman and Sheinberg argued that section 14(d)(7) did not create a private right of action, but they clearly assumed that if it did, rule 14d-10 could be enforced. Br. 54-58.[12] Even if these petitioners had raised their newly minted argument, it is meritless. All SEC rules come some time after the statute that authorizes them. Rule 14d-10 is an integral part of section 14(d)(7) policy, and it is a rule carefully designed to prevent precisely the kind of abuse shown here. The statute, not the rule, creates the right of action. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1101 (1991); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338-39 (4th Cir. 1995). If the claim is that 14d-10 is unauthorized ("goes well beyond" section 14(d)(7)) (Pet. at 18), that issue also was never raised by any litigant below, and it too is meritless. The Third Circuit expressly held in *Polaroid*, and the Fourth clearly assumed in *Kahn*, that 14d-10 claims could be maintained under section 14(d)(7).

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[12] As the court below put it, "Matsushita makes the threshold argument that it cannot be sued by MCA shareholders for violating rule 14d-10 because Congress did not intend sections 14(d)(6) and 14(d)(7) to be privately enforceable. App. 5a.

Petitioners seek to nullify completely the equality requirement of 14d-10. If petitioners' view of the law were correct, offerors could pay any amount to favored shareholders so long as they can escape SEC detection. Moreover, as the court below noted, the Williams Act has no separate SEC enforcement mechanism.

C. DELAWARE

Petitioners argue that the court's refusal to give preclusive effect to the Delaware settlement judgment conflicts with the First Circuit's decision in *Nottingham Partners*, and the Third Circuit's decision in *Grimes*.[13] This is false. No conflict exists. In the class action context, no court has ever held that preclusive effect need be given when the state law claims settled did not overlap in fact or law with the federal claims. In declining to do so, the court's decision relied upon the distinction drawn by Judge Friendly's opinion in *National SuperSpuds*[14], a distinction squarely endorsed by the Third Circuit in *Grimes*. 17 F.3d at 1564.

We first discuss the Delaware proceedings. Next we address petitioners' attempt to misstate the issue here: its effort to convince this court that this petition presents

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[13] *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991), and *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1564 (3d Cir.), *cert. denied*, 115 S.Ct. 480 (1984).

[14] *National SuperSpuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981).

the general question of the power of state courts to release federal claims within the exclusive jurisdiction of the federal courts but which substantially overlap with the state law causes of action. Finally, we turn to what the court below actually decided.

1. The Delaware Proceeding

What is striking about petitioners' discussion of the Delaware proceedings is they say nothing about what actually happened. The reason will soon be apparent.

When the financial press in September 1990 announced that a tender offer by MCA was in the making, a class action was immediately filed in the state court. Petitioners were *not* named as parties defendant. The Delaware complaint alleged only Delaware causes of action, because jurisdiction over claims under the 1934 Act is exclusively in the federal court. 15 U.S.C. §27. On December 2, after the tender offers' terms became public, this class action was filed, and at that point the Delaware proceeding became active; by December 11 a settlement "in principle" had been announced. App. 24a-25a. The notice of settlement stated that settlement talks had in fact begun "on or before the day the complaint was filed", even though the full terms of the tender offer would not be known for two months.[15]

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[15] The complaint was filed on September 30, 1990. The full terms of the tender offer became known on November 30, when required documents were filed with the SEC.

The first proposed settlement would have released federal as well as the state law claims. Though petitioners do not so much as mention it (see pet. p. 5, n. 2), in April 1991, the vice chancellor rejected the settlement as "illusionary," recognizing it to be no more than a lawyer's relief bill. *In re MCA, Inc. Shareholder Litig.*, 598 A.2d 687, 695-96 (Del. Ch. 1991). Pointedly, he characterized the Delaware law claims as "at best, extremely weak and, therefore, have little or no value." *Id.* at 694. He said that only the claims before the district court had substance. *Id.* at 695. No Delaware class was certified.

For the next year and a half <u>all</u> the litigation occurred in the federal court.[16] There were no Delaware litigation docket entries. Significantly, however, during this period, no defendant moved to dismiss the state complaint.

After an appeal had been taken to the court of appeals, <u>and after plaintiffs' brief on the merits had been filed</u>, a second run to Delaware was made: these petitioners tried to use Delaware as a forum to quash the

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[16] Here is how petitioners' counsel characterized the on-going Delaware proceedings to Judge Real, in September 1991, a full five months after rejection of the initial settlement.

> "I think it's fair to say it ceased to be prosecuted because the Delaware judge said there was no basis for the state law claims . . . *The Delaware action is not being prosecuted in any way*".
>
> ER RT 9/03/91: 8-9.

federal appeal. Petitioners announced another proposed settlement class and another proposed settlement. Their hope, no doubt, was that respondents would feel compelled to appear in Delaware, and by virtue of submitting to Delaware's jurisdiction, convert an exclusively federal case into one that could be settled with other, more pliable, counsel, counsel who had already fomented one "illusionary" settlement. Believing it inconceivable that the courts of the United States would permit their properly invoked jurisdiction to be destroyed by such strategies, respondents held to their federal forum. They did not appear.

Petitioners again say nothing of the court's response to the new settlement. The vice chancellor did approve the settlement. But he stated that its benefits were "meager" and acknowledged that "suspicions abound" of collusion. "Suspicion, however, is not enough and the objectors have offered no evidence of any collusion." App. 70a. His unease was further reflected in his order reducing counsel fees.[17] For reasons that perplexed the Ninth Circuit (App. 27a), the vice chancellor treated the federal claims as worthless, even though that issue was on appeal to the Ninth Circuit and review in that court was *de novo*. A three-member panel of the state supreme court summarily affirmed without opinion. App. 76a.

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[17] Even though they presumably had done more work since the first settlement failed, Delaware counsel had sought less as counsel fees.

The state settlement, of course, had one purpose only: to destroy the class action aspects of the 14d-10 claim. There was no provision for opting out a federal class; defendants expecting that few -- if any -- individual opt-outs would occur. Delaware class counsel had no incentive whatever to protect the 14d-10 claims of the class, and they did not. Quite the contrary; he affirmatively disparaged them. They were, he had earlier said, "frivolous"[18] (App. 26a). Delaware counsel never asked for a copy of our merits brief in the Ninth Circuit, nor did he make any effort to ascertain the contents of the thousands of pages of Japanese documents we had translated. We could go on. We could show that the Delaware brief supporting settlement misrepresented federal law.[19] So too did the notice issued to

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[18] "We concluded that any 10b-13, 14d-7 claim was frivolous, should not be pursued, would be distracting in the main litigation, and would be a waste of our time and resources when we had a big battle with defendants underway on the issues of Delaware law." Ex. E. p. 16 of Declaration of Counsel (DC) containing documents relevant to the Delaware proceedings and submitted to the Ninth Circuit.

[19] For example, the Delaware counsel incredibly suggested that even if the Ninth Circuit reversed on the class action issue, class members *still* would not recover:

> As significantly, if not more so, the federal plaintiffs in California sought class certification. This was twice fully and finally denied by Judge Real on all Rule 23 criteria. There is no class in the so-called "federal class actions." Thus, absent class members cannot, in the present posture or in any posture that I can envision, have any benefit

shareholders.[20] The "representation" was, in a word,

> from that proceeding. The persons who might benefit, if at all, if a number of remote scenarios took place, would be the individual plaintiffs, and even there they must obtain a reversal of their decisions in that court. But the fundamental fact is that class certification has been denied, and for the many thousands of MCA shareholders, all of whom have elected not to opt out, other than the few who have opted out, there is no prospect of recovery in that case because it's not a class action. And one must question at this time whether or not the statute of limitations has expired...

Transcript of Jan. 21, 1993 hearing (DC Ex. I:9-10). As another illustration consider counsel's skeptical treatment of defendant's prospects for damages. Thus, the Delaware Court was told "it is doubtful that the Ninth Circuit will overturn the Federal District Court's factual finding that Mr. Wasserman did not receive higher consideration...". DC Ex. N:32. Yet in the district court petitioners had not moved for summary judgment on damages; and they had already filed its briefs in the appeal to the Ninth Circuit, a brief which made no effort to defend the "finding."

[20] The Second Notice of Settlement was sent to the class by document dated October 27, 1992. App. 77a-101a. The story of the litigation was told in a nearly incomprehensible manner. The document was clearly false in its statements about shareholder rights in the event a shareholder opted out. The notice (App. 96a) states

> "By filing a valid Request for Exclusion, a member of the Settlement Class *will not be precluded by the Settlement from individually seeking to pursue the claims* alleged in the Delaware Actions, the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action, or any other claim relating to the events at

constitutionally inadequate as a matter of law, and certainly could be so demonstrated as a matter of fact.[21]

A *sell out, not a settlement, occurred* in Delaware. The Delaware plaintiffs knew that they had had no state claims to compromise, and they were very happy to barter away claims they could not litigate, or in any way affect through issue preclusion. Their release of the 14d-10 claim came at no cost to themselves. App. 39a. In exchange for a "settlement" that would pay each shareholder the munificent sum of two to three cents a share (before subtracting counsel fees), Delaware counsel purported to release federal claims that, according to the petitioners (Pet. at 25), are multibillion dollar claims.[22]

> issue in the Delaware Actions."

DC Ex. H:12 (emphasis added). To succeed in federal court, the document informs that one must "individually pursue" one's claims. Your choices are settle or file your own lawsuit. The truth is, however, one could have declined participation and await adjudication of the status of the federal class.

[21] As noted, respondents did not appear in Delaware. Since *Hansberry v. Lee*, 311 U.S. 32 (1940), it has been clear that a collateral attack on inadequate representation is proper in these circumstances. The right to opt-out does not substitute for the requirement of adequate representation. The latter is an additional right secured by the due process claims. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

[22] We note that petitioners were fully on notice that their settlement efforts were subject to Ninth Circuit proceedings before they paid any consideration.

Defendants, of course, had every interest in cooperating in such a "settlement." This explains why, for example, they did not move to dismiss, and why no information exists as to who the Delaware plaintiffs are, even though Delaware law requires it. *Prezant v. De Angelis*, 636 A.2d 915, 923-26 (Del. Supr. 1994). The Delaware "settlement" is an egregious example of the abuses in "settlement" class actions that Judge Becker has recently described in the General Motors case.[23]

The nature of the state court proceedings in this litigation is highly unusual. Any legal question concerning power of state courts to release exclusively federal class action claims does not come in a clear-cut manner; it is contaminated by the effort here to remove a pending federal appeal into a state forum by resuscitating a state case already determined to be meritless. The issue, moreover, is fact intensive, inextricably intertwined with the claim of inadequate representation by counsel, and of constitutionally insufficient supervision of the settlement process by the vice chancellor. App. 39a.

2. State Court Releases

While fully aware of our challenge to the collusive character of the Delaware "settlement," the Ninth Circuit did not rest its decision on that ground. Rather, the court

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[23] *In Re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, __ F.3d ___, 1995 U.S. App. LEXIS 8815 at *44-45, 82 (3d Cir. April 17, 1995).

held that the Delaware judgment was not preclusive on another basis. That court began by distinguishing between ordinary litigation and class actions, and the court recognized that it was dealing with "nontraditional forms of litigation,...class action[s]." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 402 (1980). Accordingly, "the settlement of a class action is fundamentally different from the settlement of traditional litigation". App. 38a. Class actions are representative suits. *Hansberry v. Lee, supra*, 311 U.S. 32, 41 (1940).[24] In a true representative suit, the representative bound all the members of its class.

Whatever the power of a representative to affect claims within the exclusive jurisdiction of the federal court, an issue on which this Court has never ruled,[25] no

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[24] The immediate ancestor of the modern representative suit is the Chancery court's insistence on joinder of all parties who are interested in an action. *See* Fed. R. Civ. P. 19, which embodies that insistence. When as a practical matter joinder could not be achieved because the parties were too numerous, Chancery developed the practice of authorizing representatives to sue. 1 Newberg and Conte, *Newberg on Class Actions* §1.09. pp. 1-24 to 1-26 (3d ed. 1992). "The class action suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested...is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable." *Hansberry v. Lee, supra*, at 41. *See, also, Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363 (1921).

[25] Petitioners state that "[t]his Court has held in a series of cases from *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), to *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), that certain federal statutes which confer exclusive federal jurisdiction do

court had ever held that a representative's release of claims that could not have been adjudicated was effective when the state law causes of action did not overlap, either in fact or in law, with the federal cause of action.

Nottingham Partners and *Grimes*, *supra*, are not to the contrary, as the court below recognized. App. 32a-35a. Although in a fact unnecessary to the decision in either case, [26] each court was willing to sustain state court releases of claims under the Exchange Act, but only in the context of claims that substantially overlapped with the federal claim. This is the usual situation. Rule 10b-5 claims, for example, are largely federal law counterparts of state common law fraud. In those circumstances, litigation of the state law claim *might* have issue preclusive

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not create an exception to Section 1738." (Pet. at 8.) This statement is false. *Kremer* in fact left open the issue of whether Title VII jurisdiction was exclusively in federal court. See P. Bator, et al., *Hart and Wechsler's The Federal Courts and the Federal System*, 1627 n.2. (3d ed. 1988). *Parsons* is so remote as not to warrant comment. The only decision of this Court to discuss the impact of §1738 on cases within the exclusive jurisdiction of the federal district court is *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), which specifically leaves the issue open. *Id* at 386. *See generally*, *Hart & Wechsler* at 1627-28. Moreover, none of these cases involved a class action.

[26] In both cases and unlike here, the litigants had appeared in the state proceedings, made that challenge, lost, and sought to relitigate in federal court. That is wholly improper under 28 U.S.C. §1738, even if the second challenge is reframed as a "jurisdictional" one. *Durfee v. Duke*, 375 U.S. 106, 112-16 (1963). Moreover, in both cases, both state court proceedings were sharply adversarial.

effect with respect to a "copy-cat" federal claim. There is an argument that what could be litigated or affected by litigation could be settled. The court of appeals assumed *arguendo* that this was so, even though it was aware that eminent commentators had strongly attacked the practice, a threat to federal securities policy. In exchange for settlement of weak state law claims, Delaware counsel could compromise substantial federal ones, claims over which the courts of the United States had been given exclusive jurisdiction. If that effort to oust federal jurisdiction became prevalent, "the well-travelled road to the Delaware courts could become a six lane highway." John C. Coffee, Jr., *Suspect Settlements in Securities Litigation*, *New York Law Journal*, March 28, 1991, at 5, col. 1 (DC Ex. M:1). Professor Coffee adds:

> "While the legal issue of when one court has the power to approve the release of claims pending in another forum is complex, the practical message to plaintiffs' counsel is much simpler: weak derivative and class action claims that once would have been routinely dismissed by the Delaware Chancery Court now have an enhanced settlement value, because they can confer immunity with respect to pending federal securities class actions, which often would have a significant settlement value.

"Ironically, the incentives for defendants are even clearer: never seek dismissal on the merits of a state class action if a companion federal class action raising related federal claims is possible, but instead reach a settlement in which the defendants are given a general release.

* * *

"This type of settlement can be described as "collusive" because the parties to the state court settlement are effectively depriving absent players -- the plaintiffs and their attorneys in the federal action -- on their day in court."

3. The Actual Holding

But the court of appeals thought it unnecessary to consider the general issue of state court releases of exclusively federal claims because this is not a "copy-cat" case.[27] Relying directly upon Judge Friendly's opinion in "SuperSpuds," Judge Norris distinguished such cases from those in which no overlap exists (in fact or in law) between the federal and state causes of action. He wrote:

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[27] And, as we have noted, the court had no need to address the inadequacy of the Delaware representatives.

The very cases Matsushita relies upon counsel against an expansive state court power to release exclusively federal claims. In applying an issue preclusion test rather than a "same transaction" test, the cases embrace Judge Friendly's common sense reasoning that a court's jurisdiction to extinguish claims by class settlement should not exceed its jurisdiction to extinguish claims by adjudication. Ignoring this reasoning, Matsushita asks us to impose a "same transaction" test without offering logic or precedent in support of such a test. [The "arising out of the same transaction" test is, of course, used in claim preclusion doctrine. See Restatement (Second) of Judgments § 24 (1981). However, Matsushita, as it must, expressly disclaims reliance on claim preclusion. See *Clark v. Watchie*, 513 F.2d 994, 997 (9th Cir. 1975) (state court judgment can have no claim preclusive effect on exclusively federal securities claims).]

App. 34a. Judge Norris' opinion was in fact in complete accord not only with Judge Friendly's opinion, but with that of the Third Circuit in *Grimes v. Vitalink Communications Corp.*, *supra*, upon which petitioners rely

for their "conflict" claim.[28] The Third Circuit too relied upon the very same distinction, citing *SuperSpuds* as for the proposition that "a state court class representative cannot release federal claims arising from a different factual predicate than that before the court." *Id.* at 1564. No contrary class action authority exists.[29]

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[28] The wholly unsubstantiated claim that prior tender offers are now subject to wholesale challenge is a claim too removed from reality to warrant any comment. On reopening judgments for money damages, see *Plaut v. Spendthrift Farms*, ___ S.Ct. ___, 131 L.Ed. 2d 328 (April 18, 1995).

[29] Judge Norris went on to demonstrate, and petitioners do not dispute, that the federal claims extinguished by the Delaware judgment could not have been extinguished by the issue preclusive effect of an adjudication of the state claims. See p. 5, n. 3.

CONCLUSION

The petition should be denied. Nothing more is presented than an application for review of a fact-intensive set of interlocutory orders respecting a unique, complex and indisputably illegal transaction tailored to the needs of one person.

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Respectfully submitted,

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